IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 41 OF 1999.

1. Shri Haroon Khan Umar Khan
(since deceased) through

1a. Shri Ahmad Khan Haroon
Khan.

1b. Smt. Khalida A. Khan
(since deceased by L.Rs.)

1.b(i) Omar Khan,
r/o Vodlem Bhat,
Taleigao, Goa.

1.b(ii) Zahida Khan
r/o Vodlem Bhat,
Taleigao, Goa.

1.c. Shri Razak Khan.

1.d. Smt. Noorjehan Khan,
both r/o Jogeshwari,
Mumbai.

1.e. Shri Hamza Khan.

1.f. Smt. Haniza Khan,
both r/o Panaji, Goa.

1.g. Shri Yusuf Khan.

1.h. Smt. Zainab Khan,
both r/o Mumbai.

1.i. Shri Habib Khan.

1.j. Smt. Habib Khan,
both r/o Valpoi,
Sattari, Goa. ... Appellants.

VERSUS

1. Shri Ashraj Khan.

2. Smt. Salina N. Khan
(since deceased) through L.Rs.

2.a. Shri Abdul Gafur Khan.
2.b. Smt. Ulfat Bi.
2.c. Shri Abdul Gani Khan.
2.d. Shri Imtiyar alias Hidayatullah
Khan.

2.e. Smt. Nasima Bi.
2.f. Smt. Badrun Nisa Bi.
2.g. Smt. Shamim Bi.
2.h. Shri Fahroj Khan alias
Khan Saab Khan.
2.i. Smt. Badu Bi alias Sugram Bi.
2.j. Shri Ismail Mamlekar,
all r/o Valpoi, Sattari.

3. Shri Noorula Khan
(Deleted as per Order
dated 9.3.2000).

4. Smt. Mariambi.

5. Shri Axim Khan
(since deceased) through
5.a. Smt. Mariambi Khan.
5.b.Shri Bahadur Khan.
5.c. Ssmt. Taira Bi.
5.d. Shri Nazir Khan.
5.e. Smt. Sabina Nazir Khan.
5.f. Miss Aasmat Bi.
5.g. Shri Abdulla Axim Khan.
5.h. Shri Hazimulla Axim Khan,
all r/o Valpoi, Sattari,
Goa.

6. Smt. Mariambi Khan,
r/o Valpoi, Sattari, Goa. ... Respondents.

Shri S.D. Padiyar, Advocate for the Appellants.

Shri Shaik Vahidulla, Advocate for the Respondent No.1.

CORAM: N. A. BRITTO, J.

DATE: 24TH JUNE, 2004.

ORAL JUDGMENT:

The plaintiff, through her legal heirs in R.C.S. No.27/76 is before this Court in Second Appeal.

2. The suit was filed by Aminabhi Umar Khan, widow of Umar Ibrahim Khan through her attorney Hyder

Khan Hussain Khan. It was filed against Ashraf Khan Ali Khan (Attorney of Halima Bi widow of Idyatulla Khan). Subsequently the daughter and son-in-law of the said Idyatulla Khan and Aminabi were jointed as defendants no.2 and 3 to the said Civil Suit.

3. The dispute between both the parties was regarding plot 'B' or Adicao 'B' admeasuring 920.84 sq.m. which at one time belonged to the Government. The plaintiff claimed the same alleging that it was granted to Umar Khan Ibrahim Khan by virtue of Title No.2080 by the Government, while the defendants claimed it as part of their property which was granted to the said Idyatulla Khan by virtue of Title No.1625. As far as the identity of the said disputed portion was concerned, there was no dispute about the same. In fact, DW.1 Ashraf Khan Ali Khan had marked the said disputed portion as part of his property by letters A, B, C and D on the plan produced by him at Exh.DW.1/A).

4. The learned trial Court came to the conclusion that the plaintiff had failed to prove her possession in respect of the suit property. This, the trial court did after examining some of the documents produced. The learned first appellate court also came to the conclusion that the portion of the property, which was disputed, where the construction was being

made by defendant no.1 was on the property granted to the said Idyatulla Khan and not on the grant of Amar Khan from whom the plaintiff claimed reliefs. The learned first appellate Court came to the conclusion that the learned trial Court had rightly dismissed the suit and therefore proceeded to dismiss the appeal.

5. From the conclusions arrived at by the two courts below, concurrent findings have been rendered that the plaintiff was not in possession of the disputed property namely the said property admeasuring 920.84 sq.m. Therefore, interference by this Court is not permissible.

6. Even otherwise it appears that right from the beginning the plaintiff was having difficulty to know where exactly the disputed plot 'B' was situated. This would not have been the position in case the plaintiff was ever in possession of the said Plot 'B'. The plaintiff sought a Commissioner to be appointed and who was examined on behalf of the plaintiff. The said Commissioner Shri Sansguiri prepared the plan and in the report submitted by him he stated that he could identify only Plot 'A' (regarding which there was no dispute) and that he could not identify separately Plot 'B' as there were no boundary marks. He could identify the plot given to the said Idyatulla Khan.

In the plan prepared by him he also showed two fences and particularly one which he identified at points '1' and '2' which coincide with the southern boundary of the plot given to the said Idyatulla Khan. The plaintiff has not been able to cross the said fence literally and figuratively. In other words the plaintiff or for that matter the attorney who was examined on behalf of the plaintiff gave no explanation as to why the said fence had to be there. Admittedly the defendants have been in possession of the said property from October, 1980 and thereafter the plaintiff sought an amendment and sought recovery of possession. However, it can be seen that the plaintiff (P.W.1) made a statement on 31.8.1977 stating that he wanted the said land back. In other words, it is clear from the said statement of P.W.1 Hyder Khan that even on 31.8.1977 the plaintiff was not in possession of the disputed property. The plaintiff had led no acceptable evidence that the plaintiff was ever in possession of the disputed portion namely the said plot 'B'. It is rather amusing to note that in the cross-examination of P.W.1 Hyder Khan the defendants introduced a flour mill and subsequently every witness gave evidence about the existence of the flour mill when it was not the case of the plaintiff either in the plaint or for that matter in the examination-in-chief of P.W.1 that they

had permitted anyone to set up the said flour mill. The evidence of the witnesses examined on behalf of the plaintiff has been rightly rejected by the Courts below although there could be many other reasons to reject the same.

7. Admittedly, the said Idyatulla Khan through whom the defendants claim, as on 23.1.46 was granted the property by virtue of Title No.1625 and the said title with plan have been produced at Exh.DW1/A Colly. The said Umar Khan was granted the said Plot 'B' along with Plot 'A" subsequently on 6.5.1947 vide Title No.2080. Copy of the said title and plan are at Exhs.PW1/E and PW1/B. It would be of no relevance whether the said Idyatulla was granted provisional title of the said property or it was granted as aforamento under the then Regulations in force namely Decree No.3602 dated 24.11.1917. However it is safe to presume that it is the said Idyatulla Khan who came in possession of the disputed portion as part of his property granted to him by virtue of the said Title No.1625, and, again in the absence of any reliable evidence being produced on behalf of the plaintiff it is safe to presume that the said Idyatulla Khan had continued to remain in possession of the same namely portions marked A, B, C and D on the plan (Exh.DW.1/A) as part of the property granted to him. The learned

trial Court had rightly observed that it would not matter whether the property claimed by the plaintiff was known as "Condovali" and the property claimed by the defendants through the said Idyatulla Khan was known as "Penem" as there was no dispute regarding the identity of the same. The submission made on behalf of the plaintiff is that the title documents were not examined by the Trial Court as well as by the Appellate Court since the relief of declaration in the suit for injunction filed by the plaintiff was implicit and the documents had to be examined. In support of the said submission on behalf of the plaintiff, reliance has been placed on the case of Corporation of the **City of Bangalore v. M. Papaiah and another** (A.I.R. 1989 S.C., 1809). In this case it was observed by the Hon'ble Supreme Court:-

" So far the scope of the suit is concerned, a perusal of the plaint clearly indicates that the foundation of the claim of the plaintiffs is the title which they have pleaded in express terms in paragraph 2 of the plaint. It has been stated that after cancelling the acquisition of the suit property for a burial ground the land was transferred to Guttahalli Hanumaiah under G.O. No. 3540 dated 10-6-1929 on payment of upset price. In paragraphs 3 and 5 the plaintiffs have reiterated that the first plaintiff

was the owner-in-possession. It is well established that for deciding the nature of a suit the entire plaint has to be read and not merely the relief portion, and the plaint in the present case does not leave any manner of doubt that the suit has been filed for establishing the title of the plaintiffs and on that basis getting an injunction against the appellant Corporation. "

8. In my opinion the said observations of the Supreme Court cannot be applied to the facts of this case. Admittedly, and as already stated the suit was filed by the said Aminabi Umarkhan, widow of Umarkhan only claiming to be in possession of the disputed property. The said Umerkhan and Aminabi as the evidence shows had two sons who were not made parties to the suit and therefore the said Aminabi could not have obtained any declaration in respect of title unless the other title holders were parties to the suit. Even otherwise the possession of the plaintiff has been examined by both the courts below in relation to the title claimed by her and it has been found that the plaintiff was not in possession of the disputed property. On behalf of the plaintiff a submission has also been made that the documents to prove that the grant made in favour of Umarkhan in respect of Plot No.'B' was revoked were not proved on behalf of the

plaintiff. It has been submitted on behalf of the Defendants that as regards the said documents namely Exhs.DW.1/B and DW.1/C the case of the Plaintiff was that the contents of Exh.DW.1/B was not intimated to the said Umarkhan. The findings given by both the Courts below and the conclusion I have arrived at hereinabove, is a conclusion which can be arrived at by keeping aside the said two documents. However, as rightly pointed out on behalf of the defendants, the question regarding the admissibility or proof of the said documents, was not raised by the plaintiff either before the Trial Court or for that matter before the First Appellate Court and being so, the plaintiff cannot be allowed to raise the same before this Court in Second Appeal.

9. As a result, the Second Appeal fails. The same is hereby dismissed with costs.

N.A. BRITTO, J.

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